

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 03-1953

United States of America,

Appellee,

v.

Francisco Beltran-Hernandez,
also known as El Gordo,

Appellant.

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Appeal from the United States
District Court for the
District of Nebraska.

[UNPUBLISHED]

Submitted: May 23, 2005
Filed: August 8, 2005

Before BYE, HEANEY, and SMITH, Circuit Judges.

PER CURIAM.

Pursuant to the order of the United States Supreme Court in *Beltran-Hernandez v. U.S.*, 125 S. Ct. 1053 (2005), vacating our judgment and remanding this case, we review for error under *United States v. Booker*, 125 S. Ct. 738 (2005). Because Beltran-Hernandez failed to raise a *Booker*-type issue below, we apply the plain error standard under *United States v. Pirani*, 406 F.3d 543, 549 (8th Cir. 2005), and finding none, we reaffirm our prior opinion with regard to Beltran-Hernandez.

HEANEY, Circuit Judge, concurring.

I continue to believe that a defendant's challenge to the factual basis for a sentence enhancement preserves his Sixth Amendment sentencing claim. *See United States v. Pirani*, 406 F.3d 543, 555-62 (en banc) (Heaney, J., dissenting). Moreover, I adhere to the view stated by Judge Bye in *Pirani* that defendants who did not properly preserve their *Booker* claims in the district court are nonetheless generally entitled to resentencing under a constitutional regime. *Pirani*, 406 F.3d at 562-67 (Bye, J., dissenting). Because a majority of our court held to the contrary on both counts, however, I concur.

BYE, Circuit Judge, concurring.

For the reasons articulated in my dissent in United States v. Pirani, 406 F.3d 543, 562-67 (8th Cir. 2005) (en banc) (Bye, J., dissenting), I join Judge Heaney in “adher[ing] to the view that defendants who did not properly preserve their *Booker* claims in the district court are nonetheless entitled to resentencing under a constitutional regime.” Like Judge Heaney, however, I recognize we are bound by the holding of our en banc court, and I therefore concur.
